No. 84-835

In The
Supreme Court of the United States
October Term, 1984

STATE OF NEW JERSEY,
Department of Corrections,
Petitioner,

v.

RICHARD NASH,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER NEW JERSEY DEPARTMENT OF CORRECTIONS

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QUESTIONS PRESENTED FOR REVIEW

Whether the Third Circuit Court of Appeals erred in ruling, in contravention to every other court which has considered the issue, that Article III of the Interstate Agreement on Detainers, an interstate compact entered into by 48 states, the federal government and the District of Columbia, applies to a detainer based upon a charge of probation violation?

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Phillip Carchman, petitioner; appellant below

State of New Jersey, Department of Corrections, petitioner herein; intervenor below

Richard Nash, respondent; appellee below

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Nash v. Carchman, 558 *F. Supp.* 641 (*D.N.J.* 1983) (P. App. 21)[1] *aff'd sub nom Nash v. Jeffes,* 739 *F.*2d 878 (3d Cir. 1984) (P. App. 1) *reh'g denied* (August 27, 1984) (P. App. 103 to P. App. 104).

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JURISDICTION

The judgment of the Third Circuit Court of Appeals was filed July 10, 1984 (P. App. 105 to P. App. 106). A timely petition for rehearing with a suggestion for rehearing ***in banc*** was denied August 27, 1984 (P. App. 103 to P. App. 104). Jurisdiction of the Court was invoked pursuant to 28 *U.S.C.* § 1254(1) in a Petition for *Certiorari* filed November 20, 1984. *State of N.J. etc. v. Nash,* No. 84-835. The writ was granted January 14, 1985. 53 *U.S.L.W.* 3506 (U.S., Jan. 14, 1985).

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[1] "P. App." refers to Appendix filed simultaneously and bound with the Petition for *Certiorari* submitted by petitioner, Philip S. Carchman. *Carchman v. Nash,* No. 84-776.

STATUTORY PROVISION INVOLVED

Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the State parole agency relating to the prisoner. [*N.J.S.A.* 2A:159A-3(a)]

STATEMENT OF THE CASE

Richard Nash was serving a New Jersey sentence of probation for the crime of breaking and entering with intent to rape when he was convicted in Pennsylvania and sentenced to a term of imprisonment for the crimes of burglary, involuntary deviant sexual intercourse and loitering (P. App. 4). Because Nash committed a crime

while on probation, the New Jersey Mercer County probation office, which was supervising Nash, lodged a probation violation warrant as a detainer with the Pennsylvania prison authorities (P. App. 4).

Nash subsequently attacked the legality of the detainer lodged against him, claiming that New Jersey was without power to revoke his probation, notwithstanding his commission of a new crime, because the county authorities failed to give him a probation revocation hearing within the time period prescribed in Article III of the Interstate Agreement on Detainers (hereafter referred to as IAD). *N.J.S.A.* 2A:159A-3(a).

Nash initially filed a petition for *habeas corpus* in federal court pursuant to 28 *U.S.C.* § 2254 (P. App. 6). The petition was dismissed for failure to exhaust available state remedies (P. App. 6; P. App. 95 to P. App. 97). In state court, the trial court rejected Nash's claim that his rights under the IAD had been violated. The trial court revoked Nash's probation and imposed an aggregate three-year probation violation term to be served consecutively to his Pennsylvania sentence. (P. App. 6; P. App. 51 to P. App. 80). On appeal, the Appellate Division of Superior Court affirmed and the New Jersey Supreme Court denied certification (P. App. 6; P. App. 43 to P. App. 50).

Nash then refiled his habeas petition in federal court. The district judge ruled that the IAD included within its scope a detainer lodged on the basis of a charge of probation violation. (P. App. 6 to P. App. 7; P. App. 21 to P. App. 42). The court also ruled that Nash had properly invoked the provisions of the IAD, even though he

did not comply with the application procedures set forth in the act (P. App. 21 to P. App. 42). *See also N.J.S.A.* 2A:159A-3. Since New Jersey failed to conduct a probation revocation hearing within the 180 day period indicated in Article III, *N.J.S.A.* 2A:159A-3(a), the federal court vacated Nash's probation violation sentence and ordered Nash's release from state custody (P. App. 4; P. App. 43).

The Third Circuit Court of Appeals affirmed the district court's ruling. Based upon its independent policy analysis, the Third Circuit panel concluded that the benefit to the prisoner of expanding the applicable scope of the IAD to probation violation detainers outweighed any ensuing burden to the charging state (P. App. 1 to P. App. 18). A petition for rehearing with a suggestion that the matter be reheard *in banc* was denied (P. App. 103 to P. App. 104).

This petitioner, the New Jersey Department of Corrections, was given leave by the Third Circuit to intervene on the side of the appellant, the Mercer County Prosecutor (P. App. 18 to P. App. 20). Intervention was sought because, while the Commissioner of the Department of Corrections does not supervise probationers in New Jersey, he is the State's designated administrator of the IAD. *N.J.S.A.* 2A:159A-14.[2] *See also* Department of Corrections Standard 867.E (unpublished regulation) (R. at Appendix to merits brief filed by the Intervenor in the Third Circuit at 9). Intervention was also sought because

[2] The Commissioner has legal custody of and supervision over all parolees released from the New Jersey State prison system. *N.J.S.A.* 30:4-123.59(a).

the district court's ruling in Nash had effectively invalidated the Department's policy that parole or probation violation detainers do not fall within the scope of the IAD. *See Department of Corrections Standard* 867.D (P. App. 106 to P. App. 109) (unpublished regulation) (hereafter referred to as D.O.C. Std.)

The district court had subject matter jurisdiction over the instant action pursuant to 28 *U.S.C.* § 2241 and 28 *U.S.C.* § 2254. The Third Circuit had jurisdiction to review a final judgment pursuant to 28 *U.S.C.* § 1291. A Petition for *Certiorari* was filed with the Court on behalf of the Department of Corrections pursuant to 28 *U.S.C.* § 1254(1). *State of New Jersey, etc. v. Nash,* No. 84-835. The Department's petition was consolidated with that filed by the Mercer County Prosecutor, the appellant below. *Carchman v. Nash,* No. 84-776. The petitions were granted by the Court on January 14, 1985. 53 *U.S.L.W.* 3506. The Department contends that the decision of the Third Circuit does not effectuate legislative intent and should be reversed.

SUMMARY OF ARGUMENT

This case raises the question of whether the phrase which defines the scope of Article III of the IAD: "untried indictment, information or complaint upon which a detainer is based," *N.J.S.A.* 2A:159A-3(a), applies to a detainer based upon a charge of probation violation, or whether the above-quoted phrase restricts the scope of Article III to a detainer based upon an unresolved criminal

charge. The Third Circuit ruled that a probation violation detainer was an untried indictment, information or complaint within the meaning of the IAD; every other court in the country which has considered the issue has ruled that Article III does not apply to a detainer based upon a charge of probation violation or parole violation. *Nash v. Jeffes, supra,* 739 *F.*2d at 881 & n.4. (P. App. 8 & n.4).

The majority view limits the application of Article III, which was designed as a mechanism to allow prisoners to enforce their speedy trial rights, *Cuyler v. Adams,* 449 *U.S.* 433, 436 n.1 (1981), to a criminal charge for which the substantive speedy trial right was already established as a matter of state or federal law. *See, e.g. Smith v. Hooey,* 393 *U.S.* 374 (1969); *N.J. Const.* (1948) Art. I, § 10. The Third Circuit's construction of Article III implicitly creates for a prisoner incarcerated out-of-state a substantive "speedy trial" right to early adjudication of a charge of probation violation, a substantive right which does not otherwise exist for the prisoner as a matter of federal or state law. *Moody v. Daggett,* 429 *U.S.* 78 (1972) (no due process right to immediate execution of a parole violation detainer lodged by the same sovereign); *U.S. ex rel. Caruso v. U.S. Bd. of Parole,* 570 *F.*2d 1150 (3rd Cir. 1978) (no due process right to immediate execution of a parole violation detainer lodged by a different sovereign) *Youth Correc. Institu. v. Smalls,* 172 *N.J. Super.* 1 (App. Div. 1979) (applying the holding of *Moody* in state law context).

The fundamental duty of a court engaged in statutory construction is to construe the statute in a manner which effectuates legislative intent. Here, the legislative history does not support the Third Circuit's finding that

Article III establishes a substantive right to early adjudication of a probation violation charge lodged by an out-of-state jurisdiction. Rather, the evidence is that legislators viewed the IAD as creating no substantive rights. *See e.g.* statement of Senator Hruska during Senate debate of the bill: "[t]his bill makes no charges [sic] in the substantive laws applicable to any criminal prosecutions." 116 *Cong. Rec.* S38840 (daily ed. Nov. 25, 1970).

The commentary to the IAD indicates that the IAD was drafted in order to eliminate misuse of the detainer system. The misuse was that detainers were often lodged based upon charges which had no reasonable factual basis. *See U.S. v. Mauro,* 436 *U.S.* 340, 358 & n.25 (1978). Officials lodging these detainers often had no intention of executing them, *id.,* with the result being that the prisoner was unfairly subjected to the onerous consequences of a detainer which was grounded upon a baseless charge. This abusive practice undermined efforts to rehabilitate the prisoner.

Misuse of the detainer system could only occur in the context of a detainer based upon a criminal charge, because the factual issue of guilt was unresolved. (Indeed, the accused was presumed innocent of the charge). Such misuse could not occur in the context of probation or parole violation, however, because the issue of factual guilt of the violation was conclusively established by the accused's conviction of a new crime and incarceration in another jurisdiction. *See Morrissey v. Brewer,* 408 *U.S.* 471, 490 (1972) (issue of factual guilt of crime committed while on parole need not be relitigated at parole revocation hearing).

Because the legislative history suggests that legislators did not believe that the IAD created a substantive

right to early adjudication of all charges lodged by a foreign jurisdiction and because the commentary to the IAD suggests that the impetus for the development of the IAD was reform of certain abusive practices which could not occur in the context of a detainer based upon probation violation or parole violation charge, the Third Circuit's construction of Article III is inconsistent with the legislative purpose underlying the act. The court failed in its duty, accordingly, to effectuate legislative intent.

Moreover, the Third Circuit's construction of the IAD is based upon a flawed policy analysis. Early adjudication of a probation violation or parole violation charge increases the likelihood that a revocation decision will be made. *Moody v. Daggett, supra,* 429 *U.S.* at 89 ("forcing decision immediately after imprisonment would not only deprive the paroling authority of this information, but since the other most salient factor would be the parolee's recent convictions . . . a decision to revoke parole would often be foreordained."). Since the issue of factual guilt of a charge of probation or parole violation is conclusively established and since early adjudication of these charges involves the expense of an extra round-trip transport of the accused, *Nash v. Jeffes, supra,* 739 *F.*2d at 883 n.10 (P. App. 13 n.10), it is unlikely any legislature intended to require such an expense when the likelihood of a decision to revoke is increased precisely because of early adjudication of the violation charge. For these reasons, therefore, the decision of the Third Circuit should be reversed.

ARGUMENT

No Legislative Body Intended That The IAD Should Apply To A Detainer Based Upon A Charge Of Probation Violation.

The Interstate Agreement on Detainers is an interstate compact currently entered into by 48 states, the District of Columbia and the Federal Government. Note, *Federal Habeas Corpus Review of Nonconstitutional Errors: The Cognizability of Violations of the Interstate Agreement on Detainers,* 83 Colum. L. Rev. 975, 975 n. 1 (1983). The Agreement's provisions are interpreted as a matter of federal law. *Cuyler v. Adams,* 449 *U.S.* 433 (1981).

The IAD provides a mechanism which permits the temporary interstate transfer of custody of a prisoner for the purpose of disposing of a pending charge upon which a detainer is based. *See Cuyler v. Adams, supra,* 449 *U.S.* at 436 n. 1. Pursuant to Article III, a request to dispose of such a charge may be made by the prisoner who is subject to the detainer. *N.J.S.A.* 2A:159A-3(a).[3]

A prisoner subject to a detainer invokes Article III by providing the "prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction" with written notice, pursuant to a procedure outlined in the act, of his place of confinement and his request that final disposition be made of the pending charge. *N.J.S.A.* 2A:159A-3(a). Whenever a prisoner properly invokes Ar-

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[3] In New Jersey, the IAD was enacted as part of the State's penal code. *N.J.S.A.* 2A:1-1 *et seq.* The *Title* 2A Criminal Code was repealed in 1979. *N.J.S.A.* 2C:98-2. The IAD, however, was expressly preserved from repeal. *N.J.S.A.* 2C:98-3.

ticle III, the underlying charge upon which the detainer is based must be resolved by the charging state within 180 days of receipt of notice of the request, unless a motion for a continuance is granted, for good cause shown, by "the court having jurisdiction of the matter. . . ." *Id.* In the absence of a continuance, failure of the charging state to dispose of the pending charge within the time period mandated by the IAD requires a dismissal of the charge with prejudice. *N.J.S.A.* 2A:159A-3(d).

The provisions of Article III are applicable only in instances where "there is pending in any other party State any untried indictment, information or complaint on the basis of which a detainer has been lodged. . . ." *N.J.S.A.* 2A:159A-3(a). The Third Circuit ruled that a detainer based upon a charge of probation violation was an "untried indictment, information or complaint" within the meaning of Article III of the IAD and that, hence, New Jersey's failure to provide Richard Nash with a probation revocation hearing within the 180 day time period mandated by Article III necessitated a dismissal of the probation violation charge with prejudice. *Nash v. Jeffes,* 739 F.2d 878 (3rd Cir. 1984) (P. App. 1 to P. App. 18) *reh'g denied* August 27, 1984 (P. App. 103 to P. App. 104). As the court itself acknowledged, its ruling was contrary to that of every other court in the country which had addressed the question of whether Article III of the IAD applied to a detainer based upon a charge of probation or parole violation. *Id.* at 881 & n. 8. (P. App. 8 & n. 4). *See also U.S. v. Roach,* 745 *F.*2d 1252 (9th Cir. 1984) (Article III inapplicable to probation violation detainer); *Clipper v. Md.,* 295 *Md.* 303, 455 A.2d 973 (1983) (Article III inapplicable to probation violation detainer); *Cart v.*

DeRobertis, 453 *N.E.* 2d 153 (Ill. App. Ct. 1983) (Article III inapplicable to a parole violation detainer).

In terms of a textual reading of the language of Article III, the difference between the Third Circuit's analysis and that of the majority view is that the Third Circuit considers the phrase "untried indictment, information and complaint" to be an all-inclusive one, referring to any charge that is unresolved, regardless of whether the charge is for commission of a crime or for probation violation or for parole violation. The majority of courts interprets that same phrase to be a limiting one, confining the scope of Article III to detainers based only upon an unresolved criminal charge. This case turns, therefore, on a question of statutory interpretation; namely: what type of unresolved charge upon which a detainer can be based is referred to in the phrase "untried indictment, information or complaint. . . ." *N.J.S.A.* 2A:159A-3(a).

The Court has long held that the essential function of a court called upon to construe a statute is "to give effect to" the intent of the legislature. *See, e. g., U.S. v. American Trucking Assoc.,* 310 *U.S.* 534, 543 (1939); *Dickerson v. New Banner Institute, Inc.,* 460 *U.S.* 103, 118 (1983). In ascertaining legislative intent it may be appropriate in some instances to view the statute in the context of the historic surroundings which provided the impetus for legislation. As Justice Frankfurter noted:

> the meaning of . . . a statute cannot be gained by confining inquiry within its four corners. ***Only the historic process of which such legislation is an incomplete fragment — that to which it gave rise as well as that which gave rise to it — can yield its true meaning.*** [*U.S. v. Monia,* 317 *U.S.* 424, 432 (1943) (dissenting opinion) (emphasis added)].

The Third Circuit confined its review of the available extrinsic evidence to the commentary to the IAD prepared by the Council of State Governments. *Nash v. Jeffes, supra,* 739 *F.*2d at 882 (P. App. 10). This petitioner, the Department of Corrections, (hereafter referred to as Department) submits that the court's review was too limited in scope to provide it with the complete contextual backdrop necessary to obtain a clear view of the legislative purpose sought to be achieved by means of the IAD. *See Cass v. U.S.,* 417 *U.S.* 72, 78-9 (1974) (clearly relevant extrinsic materials should be reviewed in order to ascertain statutory meaning). Since the IAD was drafted in 1956 and since it was enacted by New Jersey in 1959, more than twenty-five years ago, the Department submits that in construing the IAD it is appropriate first to look, as Justice Frankfurter put it, to "the historic process" which gave rise to the IAD.

The practice of filing detainers with out-of-state jurisdictions developed as an administrative response to a series of problems confronted by criminal justice officials. While the commission of crime recognized no jurisdictional boundary, the jurisdiction of the criminal justice system was balkanized among the 50 sovereign states, the Federal government and the District of Columbia. As one commentator explained:

> If a person suspected of crime by the authorities of one jurisdiction is apprehended and imprisoned by those of another jurisdiction for other crimes, certain problems in administering criminal justice arise. The problems are caused by the inability of one member of our federal system to compel another's surrender of its prisoner for trial, and the trouble and expense which would be involved if the prisoner were transported for trial to all jurisdictions which wanted him.

> These difficulties have given rise to the detainer system. The jurisdiction desiring custody files a detainer with the jurisdiction holding the prisoner. This detainer, or hold order, has two functions; it notifies the incarcerating authorities that the prisoner is wanted in the other jurisdiction, and it requests that the authorities desiring custody be forewarned of the prisoner's release date so they can arrange to pick him up at the institution. Thus, the incarcerating authority releases the prisoner into the custody of an agent of the requesting authority, who, by formal extradition proceedings, or more often, their waiver by the prisoner, returns him to the requesting jurisdiction. [Note, *"Detainers and the Correctional Process,"* 4 *Wash. U.L.Q.* 417, 417 (1966) (footnote omitted) (hereafter referred to as Washington Note)].

The use of detainers was widespread. It was estimated that in 1945 nearly twenty percent of all federal prisoners had a detainer lodged against them. Bennett, *"The Last Full Ounce,"* 23 Fed. Prob. No. 2, 20, 20-21 (1959) (hereafter referred to as Bennett). It was estimated that in 1971 thirty percent of all federal prisoners had detainers filed against them, that twenty-two percent of California's inmates did and that twenty-five percent of Vermont's and Georgia's inmates did. Dauber, *Reforming the Detainer System: A Case Study,* 7 Crim. L. Bull. 669, 670 (1971) (hereafter referred to as Dauber).

Detainers are filed for a variety of reasons. The bulk however, fall into one of three categories. The first is the criminal charge detainer, which is filed against an inmate who has an untried criminal charge pending. *Id.* at 677. The second is the consecutive sentence detainer, which is filed when an inmate serving time in one jurisdiction has already been convicted and been given a consecutive sentence for a crime committed in another jurisdiction. *Id.*

at 678. The third is the parole or probation violation detainer, which is filed when an inmate who, while on parole or probation in one jurisdiction, is convicted and incarcerated for commission of a criminal offense in another jurisdiction. *Id.* at 680.

As detainer practice developed, so did the belief that an inmate against whom a detainer had been lodged posed an escape risk. *See Bennett,* 23 Fed. Prob. No. 2 at 21. Such an inmate, therefore, was often denied minimum custodial status and the right to participate in work or rehabilitative programs for which minimum custodial status was a prerequisite. *Nash v. Jeffes, supra,* 739 *F.*2d at 882-3 (P. App. 11). While practice was not uniform, in some jurisdictions an inmate could also be denied parole or commutation of sentence simply because a detainer was filed against him. *Id.*[4]

Detainer practice was informal and unregulated. Detainers were filed routinely, often by minor law enforcement personnel and usually without judicial authorization. *See U.S. v. Mauro,* 436 *U.S.* 340, 358 & n. 25 (1978). In the case of a detainer based upon a new criminal charge, it did not need to be supported by an indictment, or information or complaint or by any minimally adequate showing that there existed a valid legal or factual basis to support the charge. Washington Note, 4 *Wash. U.L.Q.* 417, 417-18; Wexler and Hershey, *Criminal Detainers in a nutshell,* 7 Crim. L. Bull. 753, 753-54 (1971) (hereafter referred to as Wexler). Finally, filing a detainer did not bind the requesting authority to subsequently execute the detainer. *Bennett,* 23 Fed. Prob. No. 2 at 21. It was estimated that only one-half of the criminal charge detainers filed by prosecutors were ever actually executed. 11 *Uniform Laws Annotated,* 321, 322 (1974).

[4] Under certain circumstances the New Jersey Department of Corrections will not grant minimum custody status to an inmate against whom a detainer is filed. *D.O.C. Std.* 853.5(D) (R. at Appendix to Intervener's merits brief at 25a to 26a.)

Because a detainer could be lodged without any showing by the charging party that there existed a valid basis for filing the criminal charge, the detainer system was ripe for misuse. As one commentator noted:

> Since the legal basis for a detainer is rarely examined, a prisoner can suffer loss of privileges and parrole because of a charge for which there is not sufficient proof to obtain an indictment. Undoubtedly, detainers are sometimes used by prosecutors to exact punishment without having to try a charge which they feel would not result in a conviction. Once the detainer is filed by a prosecutor he has no reason to concern himself with the validity of the charge again until the detainee is released by the other jurisdiction. Subsequent discoveries or changes which destroy the basis for the detainer will likely be communicated to the incarcerating authorities only by the most conscientious prosecutors. [Washington Note, 4 *Wash. U.L.Q.* at 423 (footnotes omitted). *See also U.S. v. Mauro, supra,* 436 *U.S.* at 358 n. 25].

Misuse of the detainer system could never occur whenever a probation or parole violation warrant was filed. The very fact of the parole violator's subsequent conviction and incarceration was conclusive factual evidence of a violation of a condition of parole or probation for which revocation was warranted. *See Morrissey v. Brewer,* 408 *U.S.* 471, 496 (1972) (issue of factual guilt of crime committed which on parole need not be relitigated at parole violation hearing). *See also State v. Serio,* 168 *N.J. Super.*

394, 396 (Law Div. 1979) (issue of factual guilt of crime committed while on probation need not be relitigated). Thus a valid factual basis for filing a probation or parole violation detainer *always* existed. Misuse occurred only with the filing of a detainer based upon a new criminal charge, because the detainer became a mechanism through which one accused of committing a crime could be sanctioned even though the issue of factual guilt of the charge was never proved. This misuse of the detainer system was intolerable because it subjected a man to restrictions for a criminal charge of which he was presumed to be innocent. The prisoner subject to an improperly lodged detainer was powerless, moreover, to do anything about it. As he was incarcerated in a foreign jurisdiction, he was unable to invoke his fundamental right to a speedy trial on the charge. *See* Note, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions,* 77 Yale L.J. 767 (1968) (hereafter referred to as Yale Note).[5]

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[5] The Sixth Amendment guarantee of a right to a speedy trial was not applicable to the states until 1967. *Klopfer v. North Carolina,* 386 *U.S.* 213 (1967) (Sixth Amendment incorporated into Fourteenth amendment). But forty-three states, including New Jersey, had already recognized such a right in their state constitutions. *See* Note, *Convicts—The Right to a Speedy Trial and the New Detainer Statutes,* 18 Rutgers L. Rev. 828, 828 (1964) (hereafter referred to as Rutgers Note). *See also N.J. Const.* (1948) Art. I, § 10.

The problem of guaranteeing the speedy trial rights of a criminal defendant was exacerbated whenever the defendant was incarcerated out-of-state. Prior to 1969, there was no mechanism by which such a defendant could exercise his speedy trial right in the charging state. He could not, for example, seek extradition pursuant to the Uniform Criminal Extradition Act, *N.J.S.A.* 2A:160-1 *et seq.*, because the provisions of that Act could not be invoked by him. *See Cuyler v. Adams, supra,* 449

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The first attempt to address the problems just outlined was made in 1948. A Joint Committee on Detainers was formed. *U.S. v. Mauro, supra,* 463 *U.S.* at 350. It consisted of representatives from several national criminal justice and legal organizations including National Association of Attorneys General and the American Bar Association, Section on Criminal Law. *Id.* at n. 16. The Joint Committee did not attempt to draft legislation, rather it recommended several principles which should govern detainer practice. *Id.* at 350-51. The scope of the recommended principles included all aspects of detainer practice. *Id.* The IAD was subsequently drafted under the aegis of the Council of State Governments in 1956, *id.*, and enacted in New Jersey in 1959. *See N.J.S.A.* 2A:159A-1.

When the IAD is viewed in its historical context, it appears the purpose of the act is twofold: to eliminate misuse of the detainer system and to effectuate the right to a speedy trial, which is triggered whenever a criminal charge detainer is lodged against a prisoner incarcerated out-of-state. This twofold purpose is accomplished in Article III by providing the prisoner with a mechanism to enforce his speedy trial right.[6] This mechanism enables the prisoner to force the charging state to prove

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U.S. 436 n. 1. In 1969, the Court ruled as a matter of federal constitutional law that an inmate incarcerated out-of-state who was subject to a criminal charge detainer had a constitutional right to a speedy disposition of that charge. *Smith v. Hooey, supra,* 393 *U.S.* 374.

[6] Article IV provides the prosecuting authority with a mechanism to obtain temporary custody over the prisoner. See *Cuyler v. Adams, supra; U.S. v. Mauro, supra.*

the substantiality of its charge. *See Cuyler v. Adams, supra,* 449 *U.S.* 436 n. 1 ("the Detainer Agreement established procedures under which a prisoner may initiate his transfer to the receiving State and procedures that insure protection of the prisoner's speedy trial right."). The provisions of Article III of the IAD address every issue generated by the right to a speedy trial: how to invoke the speedy trial right, *N.J.S.A.* 2A:159A-3(a); 2A:159A-3(b); the time frame beyond which the right is violated, *N.J.S.A.* 2A:159A-3(a) and the remedy for a violation. *Id.* The promoters of the IAD believed that the end-product of providing the prisoner with a mechanism to enforce his speedy trial right would be that in those instances where the charge was not sustained, the prisoner would no longer be precluded, by virtue of the detainer, from eligibility for reduced custodial status or from participating fully in the rehabilitative programs offered in the prison in which he was housed.

The Third Circuit did not view the purpose of the IAD as reform of detainer practice or as effectuating speedy trial rights of prisoners incarcerated out-of-state. It viewed the purpose of the IAD as primarily rehabilitative. *Nash v. Jeffes, supra,* 739 *F.*2d at 882-83 (P. App. 10 to P. App. 13). It felt that this purpose would be furthered if the IAD were construed to require early adjudication of all unresolved charges, regardless of whether the charge was for commission of a new crime, or for probation violation or parole violation. *Id.* Implicit in the court's analysis is the conclusion that Article III of the IAD creates a substantive right to a "speedy trial," for prisoners subject to probation violation or parole violation detainers, who otherwise have no substantive right

to early adjudication of the violation charges against them.[7]

The Third Circuit found support for its decision in the commentary generated by the Council of State Governments, which it declared was the "most important legislative history of the IAD." *Id.* at 882 (P. App. 10). This commentary does indicate that the filing of a detainer can affect a prisoner's custodial status and, thereby, preclude the prisoner from programs for which minimum custodial status is a prerequisite. Council of State Governments, Suggested State Legislation for 1957 at 74. The commentary also notes that the prisoner can become embittered both by his close custodial confinement in prison and by his uncertain future, with the result that ongoing rehabilitative efforts can be undermined. *Id.* Nothing in the commentary, however, provides any support for the proposition that the purpose underlying the IAD is to create a substantive "speedy trial" right to early adjudication of a detainer based upon a pending charge to which the right to a speedy trial does not otherwise attach.

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[7] A parole or probation violator incarcerated for committing a new crime while on parole has no "speedy trial" right to a revocation hearing during the interval in which he is serving his new sentence. *Moody v. Daggett,* 429 *U.S.* 78 (1976) (No due process right to have parole violation detainer executed promptly when serving an intervening sentence for the same sovereign). *See also U.S. ex rel Caruso v. U.S. Bd. of Parole,* 570 *F.*2d 1150 (3rd Cir. 1978) (no due process right to have parole violation warrant lodged as a detainer executed promptly when serving intervening sentence for different sovereign). Nor has such a substantive right been recognized as a matter of New Jersey state law. *Youth Correc. Institu. Comp. Trustee Bd. v. Smalls,* 172 *N.J. Super.* 1 (App. Div. 1979) (right to timely revocation hearing does not commence until detainer is executed and prisoner is taken into custody as a parole violator).

Certainly, had this advisory group intended to create a substantive right to early adjudication of all unresolved charges rather than just give effect to the pre-existing right of a criminally accused to a speedy trial, the commentary surely would have been explicit on this point.

The legislative history suggests, moreover, that legislators did not believe that they were establishing by means of the IAD a substantive right to early adjudication of all open charges lodged by another jurisdiction. The Senate Report on the IAD notes:

> The agreement on detainers, . . . makes the clearing of detainers possible at the instance of a prisoner who is serving a sentence . . . . The Agreement gives the prisoner no greater opportunity to escape a conviction, but it does provide him with a procedure for bringing about a prompt test of the *substantiality* of detainers placed against him by other jurisdictions. The result is to permit the prisoner to secure a greater degree of certainty as to his future and to enable the prison authorities to plan more effectively for his rehabilitation and return to society. [S. Rep. No. 1356, 91st Cong., 2d Sess 2 (1970) *reprinted in* 1970 U.S. Code Cong. & Ad. News 4864, 4865 (1970) (emphasis added)].[8]

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[8] It is submitted that it is appropriate to consider the legislative history generated by Congress, even though the Third Circuit and the District Court did not. (P. App. 10; P. App. 26 to P. App. 27). While the provisions of the IAD are enforceable against a state only by virtue of that state's legislative enactment of the act, the act's provisions are interpreted as a matter of federal law. *Cuyler v. Adams, supra,* 449 *U.S.* 433. From a methodological standpoint, it is noteworthy that in reaching its decision in *Cuyler,* the Court reviewed Congressional legislative history in construing Article IV of the IAD even though the facts before the Court involved the involuntary transfer of a Pennsylvania state prisoner to New Jersey to answer state crim-

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The House Report makes the same point. H.R. Rep. No. 1018, 91st Cong., 2d Sess. 1-2 (1970).

In discussion of the bill in the Senate, Senator Hruska noted: "[t]his bill makes no charges [sic] in the substantive laws applicable to any criminal prosecution." 116 *Cong. Rec.* S38840 (daily ed. Nov. 25, 1970) (statement of Sen. Hruska). The same observation was made in the House of Representatives: "[t]he agreement on detainers does not affect the applicable law in any criminal case." 116 *Cong. Rec.* H14000 (daily ed. May 4, 1970) (statement of Rep. Poff).

Further, in construing Article IV of the IAD, the Court has noted that except where expressly stated, the IAD does not supplant substantive rights which otherwise exist for the prisoner as a matter of state or federal law. *Cuyler v. Adams, supra,* 449 *U.S.* at 450. In *Cuyler,* the Court was presented with the question of whether a state prisoner transferred involuntarily pursuant to Article IV of the IAD had a right to a pre-transfer hearing which, while not expressly provided for in Article IV, was a pre-existing right afforded the prisoner pursuant to the Uniform Criminal Extradition Act. The Court concluded that he did.

The Court noted that Article IV provided that: "[n]othing in this Article shall be construed to deprive any prisoner of any right which he may have to contest

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inal charges. *Id.* Implicit in the Court's approach is the view that Congressional legislative history is always to be reviewed when construing the meaning of the IAD, even if the Federal Government or the District of Columbia is not a party to the lawsuit before the court.

the legality of his [transfer] . . . ." *Id.* at 449-50. Based upon this provision, the structure of the act and its legislative history, the Court held that (aside from one express exception set forth in Article IV): "prisoners transferred pursuant to the provisions of the Agreement are not required to forfeit any pre-existing rights they may have under state or federal law to challenge this transfer to the receiving State." *Id.* at 450. It is submitted that consistent with *Cuyler,* just as Article IV of the IAD was not intended to *supplant* substantive rights established elsewhere as a matter of state or federal law, Article III of the IAD was not intended to *create* substantive rights not elsewhere established as a matter of state or federal law.

In light of the foregoing, it is clear that the purpose underlying the IAD is not, as the Third Circuit supposed, primarily to further rehabilitation by establishing a substantive right to early adjudication of any unresolved charge, but rather, to provide in the case of a criminal charge detainer, to which a substantive right to a speedy trial otherwise existed, a mechanism to test the substantiality of the criminal charge, with the net result being that the prisoner who was innocent of the charge would not be precluded, by reason of a detainer, from participating in the full range of rehabilitative programs available at his place of incarceration. This being the purpose underlying the IAD, it necessarily follows that the scope of Article III is limited to detainers based upon an unresolved criminal charge.

Furthermore, when the IAD is viewed in its historical context, the meaning of the language of the statute itself is plainly evident. The scope of Article III is delineated by

the following language: "whenever there is pending in any other party State any *untried indictment, information or complaint* on the basis of which a detainer has been lodged . . . he shall be brought *to trial* within 180 days. . . ." *N.J.S.A.* 2A:159A-3(a) (emphasis added). The terms "untried indictment, information or complaint" are not normally thought of as generic terms. They are technical terms which refer to a criminal charge. A complaint, for example, is defined in the Federal Rules of Criminal Procedure as "a written statement of the essential facts constituting the offense charged." *F.R.Crim.P.* 3. An indictment or information consists of a statement of the facts outlined in a complaint but also contains "the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated." *F.R.Crim.P.* 7(c). Capital offenses and offenses subject to more than a year's imprisonment must be based upon an indictment. *F.R.Crim. P.* 7(a).

Furthermore, the word "trial" is not customarily used to refer to all manner of adjudications regardless of how informal the proceeding may be. Rather, a trial, especially a criminal trial, is a formal proceeding at which all the rules of evidence apply and at which the accused is afforded the full panoply of due process rights. A probation or parole revocation hearing, however, is by definition an informal proceeding, with limited due process rights. *See Morrissey v. Brewer,* 408 *U.S.* 471, 484 (1972) (right to hearing), *Gagnon v. Scarpelli,* 411 *U.S.* 778 (1973) (limited right to counsel). It is highly unlikely, therefore, that the draftsmen of the IAD would have chosen terms like "indictment," "information," "complaint" or

"trial" to define the scope of Article III if they intended the IAD to encompass all detainers regardless of the basis upon which they were filed. Rather, as the historic context of the act makes clear, these terms were chosen deliberately to indicate that the scope of Article III was limited to criminal charge detainers.

In addition, if it was intended that parole violation detainers were to be included within the scope of the IAD, the draftsmen would have devised some other notification mechanism to trigger the rights provided in Article III. Under the terms of the IAD, the provisions of Article III are triggered when the inmate sends written notification to the court and to the prosecutor *N.J.S.A.* 2A:159A-3(a). If the scope of the Agreement is limited to criminal charge detainers, this notification mechanism is efficacious because notice is directed to the officials likely to be familiar with the charge and who may have even been responsible for filing the detainer. If the scope of the IAD is intended to include parole violation detainers, however, the notification mechanism in Article III is wholly ineffective because judges and prosecutors do not normally handle parole revocation proceedings. *See, e.g., Morrissey v. Brewer,* 408 *U.S.* 471 (1972). *See also N.J.S.A.* 30:4-123.63(d) (if proof of parole violation is established, State Parole Board is to determine whether revocation is desirable). Surely, if it was intended that parole violation detainers be included within the scope of Article III of the IAD a more efficacious notice mechanism would have been devised.[9]

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[9] The Third Circuit recognized this problem as applied to parole violation detainers, but declined to address it in the context of the case before it. *Nash v. Jeffes, supra,* 739 *F.*2d at 883-84 n.11 (P. App. at 13-14 n.11).

The Third Circuit's decision was not based upon consideration of the available extrinsic evidence as much as it was based on the court's view that early adjudication of a detainer based upon probation violation charge was a salutary policy goal which promoted the rehabilitation of a prisoner. *Nash v. Jeffes, supra,* 739 *F.*2d at 881-84 (P. App. 8 to P. App. 14). *See also id.* at 882 n.7 and 883 n.9 (P. App. 9 at n.7 and P. App. 13 at n.9). The court's policy analysis, however, is flawed.

The fundamental assumption underlying the court's analysis is that a prisoner subject to a detainer based upon a charge of probation violation can reasonably expect to have the pending probation violation charge resolved in his favor. *See id.* at 883 (P. App. 12). The Third Circuit believed the prisoner, therefore, should be able to invoke Article III and compel an early adjudication of his probation violation charges because, if and when the charge was resolved in the prisoner's favor, the detainer against him would be dissolved and he would then be able to participate fully in the rehabilitation programs offered by the state in which he was incarcerated. *Id.* (P. App.12).

It is highly unlikely, however, that early adjudication of a probation violation charge lodged because the prisoner committed a crime while on probation will result in a dismissal of the charge. The issue of factual guilt of the violation is conclusively established when one commits a new crime while on parole or probation. *See Morrissey v. Brewer, supra,* 408 *U.S.* 471, 490 (issue of factual guilt of new crime committed while on parole cannot be relitigated at a parole revocation hearing). *See*

also State v. Serio, supra 168 *N.J. Super.* 394, 396 (issue of factual guilt of new crime committed while on probation cannot be relitigated at a probation revocation hearing.) Given this legal standard, it is often, as the Court recognized in *Moody v. Daggett, supra,* 429 *U.S.* 78, in the prisoner's interest to delay a parole or probation revocation hearing for as long as possible, because in the interim the prisoner may establish circumstances, such as a good institutional record or parole plan, which might rebut the presumption of revocation.[10] *Moody v. Daggett, supra,* 429 *U.S.* 78, 89. In view of this, the assumption underlying the Third Circuit's policy analysis, that a prisoner subject to a probation violation detainer can reasonably expect the charge to be resolved in his favor, has no realistic basis. In practice, as the Court has noted, early adjudication of a parole or probation violation charge *increases* the probability that a decision to revoke will be made. *Moody v. Daggett, supra,* 429 *U.S.* at 89 ("forcing decision immediately after imprisonment would not only deprive the parole authority of this vital information, but since the other most salient factor would be the parolee's recent convictions . . . a decision to revoke parole would often be foreordained."). Thus, such a prisoner would not realize any measurable rehabilitative benefit if Article III of the IAD were applicable to probation or parole violation detainers, pre-

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[10] Under New Jersey parole law, parole must be revoked whenever a parolee commits a new crime while on parole, unless the parole can establish mitigating circumstances, unrelated to the commission of the offense, which would militate against a revocation decision. *N.J.S.A.* 30:4-123.60(c), *See also Morrissey, supra,* 408 *U.S.* at 490. In the case of probation, the sentencing judge has greater discretion in determining whether a violation should result in revocation of probation. *N.J.S.A.* 2C:45-3.

cisely because early adjudication of the pending charge would tend to assure that a revocation decision will be made. Hence, the prisoner would continue to be subject to a detainer while serving the intervening sentence.[11]

The Third Circuit recognized that when a prisoner commits a new crime while on probation a virtually conclusive presumption that probation will be revoked is triggered. *Id.* at 883 & n.7 (P. App. 9 & n.7). The court acknowledged that in such a case the interest of the prisoner in seeking an early adjudication of the pending probation violation charge would not be sufficiently compelling to outweigh the administrative burden and expense to the state in conducting the revocation hearing prior to completion of the out-of-state sentence. *Id.* at 882 (P. App. 9 & n.7). *See also id.* at 883 (P. App. 13 n.10) ("requiring adjudication before the out-of-state sentence has been served increases the cost because it requires

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[11] It might be suggested that a prisoner might benefit by an early revocation hearing even if his parole is revoked because the violation term might run concurrently to the new, out-of-state sentence. In New Jersey, however, parole violation terms are presumed to run consecutively to any sentence imposed for a crime committed while on parole. *N.J.S.A.* 2C:44-5(c) (amended eff. January 12, 1984); *N.J.S.A.* 30:4-123.27 (repealed eff. April 20, 1980). (No presumption is operative in the case of probation violation; the issue is a matter of judicial discretion. *N.J.S.A.* 2C:44-5(a)). The Parole Board, moreover, has no power to order that the violation term run concurrently to a sentence imposed for a crime committed while on parole; such power is exclusively vested in a judge of the New Jersey Superior Court. *Id.* In any event, even if the violation term were concurrent, a detainer would be lodged for the duration of service of the violation term, to indicate the state's wanting-interest during the period of service of the term.

an additional trip.")[12] However, the court felt that in a "significant number" of cases, the probation violation charge lodged against the prisoner incarcerated out of state would not be based on the new conviction at all, but would be based upon technical, noncriminal violations of the prisoner's probation agreement. *Id.* at 882 n.7 (P. App. 9 n.7). The court concluded, accordingly, that since the adjudication of a technical probation violation charge may require live testimony and that since a prisoner who is incarcerated out-of-state may be compromised by the delay in the adjudication of the charge, "concern for a fair adjudication, as well as concern for constitutional rights should inform our interpretation of the IAD" *Id.* (P. App. 10 n.7).[13] Nothing in the record before the Third Circuit, however, provided any support for the view that a significant number of probation violation detainers lodged against prisoners serving new sentences are based solely on technical, noncriminal charges and the factual circumstances which would give rise to such a scenario do not readily come to mind, at least under New Jersey law.

The Third Circuit's ruling leads to a paradoxical result that surely no legislature ever intended. A prisoner subject to a criminal charge detainer does not receive any new substantive rights from the act; he only is given a mechanism to enforce the substantive right he already

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[12] See J.A. 6 at ¶ 8 for an estimate of the costs incurred in transporting a prisoner interstate.

[13] The Third Circuit had previously ruled that a prisoner serving a sentence in another jurisdiction has no due process right to an immediate parole revocation hearing. *U.S. ex rel. Caruso v. U.S. Bd. of Parole, supra,* 570 F.2d 1150.

has, the right to a speedy trial. *See Smith v. Hooey, supra,* 393 *U.S.* 374; *Klopfer v. North Carolina, supra,* 386 *U.S.* 213. But by making Article III applicable to a probation violation detainer, the Third Circuit has ruled in effect that the IAD creates for a prisoner subject to such a detainer a substantive "speedy trial" right to early adjudication of the probation violation charge, even though he otherwise has no such substantive right. *See Moody v. Daggett, supra,* 429 *U.S.* 78; *U.S. ex rel Caruso v. U.S. Board of Parole, supra,* 570 *F.*2d 1150; *Youth Correct. Institu. v. Smalls, supra,* 172 *N.J. Super.* 1. It is certainly anomalous to conclude that by virtue of the single phrase "untried indictment, information or complaint" a legislature intended to create a substantive right to early adjudication of a charge for a prisoner subject to a probation or parole detainer while it only intended to enforce the pre-existing substantive right to a speedy trial for the prisoner subject to a criminal charge detainer. Further, it is anomalous to conclude that any legislature intended to require the expense of returning temporarily to the jurisdiction a prisoner subject to a parole or probation violation detainer for the purpose of conducting an early revocation hearing when the issue of factual guilt is already conclusively resolved and the probability that the prisoner's parole or probation will be revoked is increased precisely because an early revocation hearing is being conducted.

It may be contended that since, from a rehabilitative standpoint, the impact of a detainer upon a prisoner is the same regardless of the nature of the charge upon which the detainer is based, the scope of Article III of the IAD should therefore include all detainers based upon an unre-

solved charge. If the goal sought to be achieved by means of the IAD was to enable all prisoners subject to detainers to participate fully in rehabilitative programs, however, surely this goal could have been accomplished directly simply by enacting an interstate agreement which provided that no prisoner subject to a detainer would be foreclosed by virtue thereof from participating in any rehabilitative programs. Such legislation would have been tantamount to an elimination of the prison policy that an inmate subject to a detainer poses an escape risk. This policy is surely a reasonable one, however, particularly when an inmate serving a relatively short sentence in one jurisdiction is charged by an out-of-state jurisdiction with a serious crime which carries with it a heavy penalty. Therefore, since the practice of restricting the custodial status of a prisoner against whom any kind of detainer is lodged is justified from a corrections standpoint, it cannot be supposed that the intended function of the IAD is to eliminate the disparity between the treatment of prisoners subject to a detainer and those who are not.

It might also be contended that the scope of Article III of the IAD should include all detainers based upon an unresolved charge because in every case the prisoner experiences some uncertainty about his future. This is unquestionably the case for a prisoner subject to a criminal charge detainer as the very question of factual guilt or innocence of the charge is unresolved. In addition, the question of disposition of sentence, if convicted, is also unresolved.

The prisoner subject to a detainer based upon a charge of probation violation on parole violation, however, does not experience anything near the same degree of uncertainty, either with respect to the issue of his guilt of the violation or with respect to the issue of the ultimate deposition of the violation charge. The issue of factual guilt of the violation is already conclusively established. *See e.g., Morrissey v. Brewer, supra,* 408 *U.S.* at 490. He also knows that his probation or parole will be revoked unless he can establish sufficient mitigating circumstances, unrelated to the commission of the new crime, which might justify a decision not to revoke. *Id.* Since a parolee or probationer has already been sentenced, moreover, he also knows the maximum extent of his sentence obligation to the charging state. The only open question is the length of the violation term which might be imposed.

With respect to probation revocation, under New Jersey law the sentencing judge exercises great discretion in setting the length of the violation term. *N.J.S.A.* 2C:45-3; *N.J.S.A.* 2A:168-4 (repealed eff. Sept. 1, 1979). The judge also has discretion in determining whether the violation term is to be served consecutively or concurrently to the new sentence. *N.J.S.A.* 2C:44-5(a).

With respect to parole, with the exception of the period from September 1979 to January 1984, parole violation terms were always required to be served consecutively to the intervening sentence. *N.J.S.A.* 30:4-123.27 *repealed* eff Sept. 1, 1979 by *N.J.S.A.* 2C:44-5(c) (parole violation term presumed to run concurrently unless otherwise provided by the sentencing judge) *amended* eff. Jan. 12, 1984 (parole violation term presumed to run consecutively). In addition, prior to April 1980, New Jersey parole law required a prisoner whose parole was revoked to serve the balance of his sentence as a viola-

tion term computed from the date of parole release. *N.J.S.A.* 30:4-123.24 (repealed eff. Apr. 20, 1980). After 1980, parole violation terms were established pursuant to a schedule set forth in regulation. *N.J.S.A.* 30:4-123.56(a) (eff. April 20, 1980). *See also N.J. Admin. Code* 10A:71-7.16. As can be seen, under New Jersey law the length of the violation term is predictable to some degree, especially with respect to a parole violation term. Accordingly, neither a prisoner subject to a probation violation charge nor a prisoner subject to a parole violation charge experiences anything like the uncertainty about his future which is experienced by the prisoner subject to a new criminal charge. It is unlikely, therefore, that any legislative body intended that IAD apply to them.

Justice Reed noted that statutory interpretation is exclusively a judicial function, vesting in one branch of government, the judiciary, the duty to construe the meaning of an enactment of another branch, the legislature. *U.S. v. American Trucking Assoc., supra,* 310 *U.S.* at 544. Justice Reed sounded a word of caution, however: "[o]bviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body." *Id.* The Third Circuit has fallen prey to the danger inherent in engaging in statutory construction. As the foregoing makes clear, the court has not construed the IAD in a manner which effectuates legislative intent. Rather the court has ignored that intent and imposed its own policy view instead. Its decision should be reversed.

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CONCLUSION

For all the foregoing reasons, this petitioner, the State of New Jersey, Department of Corrections, submits that the judgment of the Third Circuit should be reversed.

Respectfully submitted,

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